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No. 07-1317

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In The Supreme Court of the United States

ROLAND ANTHONY EVANS,

Petitioner,

v.

GENE M. JOHNSON, Director of The Virginia Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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No. 07-1317

IN THE SUPREME COURT OF
THE UNITED STATES

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the Fourth Circuit

October Term, 2008

ROLAND ANTHONY EVANS,

Petitioner,

v.

GENE M. JOHNSON, in his official capacity as
Director, of the Virginia Department of Corrections,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Counsel for Petitioner Roland Anthony Evans answers and refutes the irrelevant and weak issues presented in Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

I. Petitioner's issue of "conflict" is a legitimate one and worthy of examination in this Court.

Respondent claims that Petitioner identifies no conflict between the decision below and the law of any other state or federal court. He claims that this case is nothing more than a plea for error correction and that no error occurred. Actually, respondent is mistaken on both points. Res. at pp.11, 12.

Petitioner brings before this Court the fundamental constitutional right of a defendant to a fair trial decided by an untainted jury. Given the abundance of case law, the constitution itself, and the facts of this case as presented in testimony and in numerous affidavits, it is clear that Petitioner has identified conflict with the decision below and controlling legal authorities.

Upon review this Court closely examines the facts of this case, compares the court decision below with the law and practice this Court may conclude that the judgment in this case should be overturned.

Respondent attempts to throw a red herring into the argument by stating that the Petition must be overturned under the standard set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Res. at p.12. This is error.

Petitioner has proceeded through the state appellate process, the federal appellate process and was not procedurally barred from bringing the instant issue of juror misconduct before this Court

because he had maintained a consistent argument throughout these proceedings. This petition is not a second or successive petition. It is but a continuation of the original issue, and it has been orderly in its presentation and seeks to demonstrate to this Court that decisions from the courts below deal with a Constitutional issue which is at stake. If a citizen in the United States cannot bring his unconstitutional court decision before its highest court in the land, it is a sad day indeed.

This is a first petition and a Certificate of Appealability ("COA") should have been issued regarding it. The denial of the COA on the fundamental issue of a right to a fair trial by an impartial jury is what Petitioner is asking this court to correct.

As Respondent correctly states, "Initially, the state trial court stumbled when it failed to conduct an evidentiary hearing on the impact of an *ex parte* communication between a third party and a juror. The state intermediate appellate court reversed this decision and remanded the case to the state trial court for a proper hearing." (emphasis added) Res. at p.1. On this issue alone Petitioner is entitled to a grant for a writ. Scott v. Commonwealth, 399 S.E.2d 648, 11 Va. App. 516, Record No. 1180-88-2 Ct. of App. (1990).

Respondent strongly addresses the issue of "error correction," which is actually one of the broad functions of the review in granted cases. He quotes Tory v Cochran, 544 U.S. 734, 739 (2005). Res. at p.14—"this Court simply cannot devote itself to case-

specific error correction." In quoting Tory, the respondent quotes the dissenting opinion when the majority of this Court actually granted Troy's petition for a writ.

In addition, Respondent quotes Overton v Ohio, 534 U.S. 982, 985 (2001). Res. at p.14, "the Court cannot act as a court of simple error correction." This Court actually found that the city of Toledo "clearly violated the Fourth Amendment." In this case, the Court had already answered directly the basic legal question presented in this case, so it did not grant certiorari for the purpose of hearing that question argued once again. Nevertheless, the Court acted—it summarily reversed the decision below because the matter had a general aspect.

Another referenced case, Res. at p. 14, Calderon v. Thompson, 523 U.S. 538, 569 (1998), the respondent quoted yet another dissenting opinion, "it is...axiomatic that this Court cannot devote itself to error correction." However, the majority granted certiorari and the COA was reversed.

II. With regard to Respondent's claim that Petitioner's writ is a poor vehicle to develop substantive law, may it be clear to Respondent that this Court may use any vehicle at its disposal to correct errors in constitutional law.

Petitioner is not seeking to establish any "new rule" relating to *ex parte* communications between jurors and third parties as barred by Teague v. Lane, 489 U.S. 288 (1989), but simply urges this Court to

clearly define the limits of *ex parte* communications between jurors and third parties to preserve the sanctity of this precious right to be tried in this country by an untainted jury.

III. In Petitioner's case, the Virginia courts improperly concluded that the petitioner had suffered no prejudice from the *ex parte* communication between the juror and a third party because the court presided over an "improper" hearing.

Petitioner's evidentiary hearing regarding the central issue of juror misconduct was conducted with only four of the twelve jurors present. It is important to hold a proper hearing with all jurors present and conduct thorough examinations of each juror. As in Scott, at p. 651—"[I]t remains undisclosed whether the other jurors heard the remarks or were affected by them. 'In any event, [Scott] was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.' Parker v. Gladden, 385 U.S. at 366, 87 S. Ct. (1966) at 471. On the evidence in this record, the Commonwealth has not established that Scott enjoyed this entitlement. The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded." (Emphasis added.)

Respondent suggests that the factual findings of the state trial courts and eventually the Fourth

Circuit, after review of the federal habeas corpus petition, simply deferred to their factual findings. Res. at p.16.

Petitioner argues that the factual findings within the evidentiary hearing are "suspect" due to the fact that they are based on testimony of a fraction of the sitting jury in this case thereby rendering the findings unreliable and therefore undependable.

In addition, the District Court actually determined its denial of review and issuance of a COA based on procedural default. Pet. at p.38a. The Fourth Circuit Court of Appeals determined there was no procedural default on this issue, yet upheld the District Court denial of a COA. Pet. at p.16. Court documents state the facts of the case, but could not base their decisions on the facts of the case because the District Court denied the COA on procedural grounds—a conflict between these courts, to say the least.

Respondent states that petitioner must show that the decision of the state court was "contrary to" or an "unreasonable application of" clearly established precedent from this Court. Res. at p.16.

Petitioner responds that this Court would be more favorable than not to agree with his argument that is firmly established within its jurisdiction and affirm its decisions.

Respondent asks what principles have this Court "clearly established" and lists the following:

1. The Constitution protects a defendant's right to an impartial jury. U.S. Const. amend. VI, applicable to the States through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV. Res. at p. 17.

2. Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

   a. Mattox v. United States, 146 U.S. 140, 150 (1892). Petitioner reminds Respondent that Mattox was awarded a new trial.

   b. Remmer v. United States, 347 U.S. 227 (1954). Respondent quotes, "[I]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial...That presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

Allow Petitioner to remind Respondent of the facts of his case. A private communication directly with a juror during petitioner's trial regarding the pending matter before the jury is deemed presumptively prejudicial. The court had specifically and repeatedly instructed and directed the jury to make absolutely no contact with anyone outside the courtroom who is speaking about the trial in any respect. Upon casual contact with the petitioner's "uncle" this juror disregarded the judge's instruction, even asking which trial the "uncle" was attending. He did not come forward (on day two—the day of the incident—of the three day trial) and later upon inquiry, denied before the trial judge that he had "spoken to anyone about the case."

Upon instructions from the state court of appeals, the trial court conducted an improper hearing without the full panel at which time this juror's testimony changed remarkably from the initial questioning by the judge subsequent to the jury's finding of guilt.

The heavy burden necessarily resting upon the Government to establish that such contact and conversation between Petitioner's "uncle" and the juror were harmless to the defendant was not met. Petitioner avers that the cases Respondent cites in support of his argument are as weak as water. They are as follows: Res. at pp.18,19.

Smith v. Phillips, 455 U.S. 209, 217 (1982). A case where a juror submitted an application for employment to the District Attorney's office during the trial, Smith was not awarded a new trial.

Irvin v. Dowd, 366 U.S. 717, 723 (1961). Judgment denying habeas was vacated and case was remanded to District Court allowing the State reasonable time to retry petitioner. At *voir dire* the members of the jury admitted that they thought petitioner was guilty, but each indicated that, notwithstanding his opinion, he could render an impartial verdict. (Case had been tried in the press. Change of venue to neighboring county did not suffice for justice to be served as determined by the court.)

Parker v. Gladden, 385 U.S. 363, 365-66 (1966). Bailiff had commented that the defendant was a "wicked fellow" who was "guilty." In finding prejudice, the Court stressed "the official character of the bailiff—as an officer of the court as well as the State" which status would "beyond question carry great weight with the jury which he had been shepherding for eight days and nights." It would appear that all 12 jurors testified at the post-trial evidentiary hearing in that case.

Rushen v. Spain, 464 U.S. 114, 120 (1983). When a state court finds that a jury's deliberations were not biased, this finding of fact—on a question the state courts were in a far better position than the federal courts to answer—deserves a 'high measure of deference,' and may be set aside only it is 'lacks even fair support in the record.'

Petitioner disagrees with the Respondent's attempts to apply the above stated principles to the case at bar and his conclusion that the state court

committed no error as he avers the following: Res. at p.20,21.

1. The state court conducted the required hearing to inquire into the issue.

2. The evidence was uncontested that only one juror heard the comments at issue and that he did not impart those comments to the other jurors. Four jurors testified at the hearing.

> *"Therefore, the present case is not one where the entire jury heard prejudicial comments."*

Petitioner asks Respondent how can the court or the attorney general know the above statement to be true when only four out of twelve jurors attended the hearing and testified?

3. The trial court properly sorted the applicable credibility issues.

> *[T]he ex parte statements did not come from a court officer, such as a bailiff, to whom a juror might pay special deference.* Res. at p.20.

Petitioner asks this Court to consider the source of the damaging and prejudicial information—certainly a close friend of the family or relative who is personally acquainted with the defendant, is familiar with his past, and has a decided opinion on what the outcome of the trial should be would actually require as much or more deference than a court officer (bailiff) in uniform who

is employed by the state that is actively prosecuting the defendant? Parker

Again, the stated question presented for review in this case by Petitioner:

> Was Petitioner's Sixth Amendment Right to a fair trial by an impartial jury violated where one of the petitioner's jurors met with a member of petitioner's family outside the courthouse during a recess of petitioner's trial and was told that the petitioner was "slick" and deserved at least 30 years in prison and, in response, the juror inquired of the family member which trial the family member was in and was told that it was the petitioner's trial.? Petition at p. i.

Petitioner agrees with Respondent when he states the following: Res. at p. 21. "This Court has long recognized that the factual determinations inherent in assessing the impact upon a particular juror of an *ex parte* statement are quintessentially factual questions for trial courts to make."

However, again this begs the question. Petitioner agrees that this principle stated is correct, but what is before this Court is the true requirement for an impartial jury, not simply an impartial juror. The trial court did not follow its standard of interviewing all jurors to determine if the "jury" was impartial.

CONCLUSION

Petitioner renews his conclusion in his petition—"For the reasons stated, the Court should grant the petition for writ of certiorari in order to provide petitioner with his sixth amendment constitutional right to be tried by an impartial jury." Pet. at p.22.

/s/
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